FILE COPY.

Office Supreme Court, U. S.
FILED.
DEC 20 1906
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 226

CITY OF CHICAGO,
Appellant,

vs.

DARIUS O. MILLS and PEOPLES GAS LIGHT AND COKE COMPANY,
Appellees.

Reply Brief in Behalf of Appellant.

JAMES HAMILTON LEWIS,
Corporation Counsel.

HENRY M. ASHTON AND
DAVID K. TONE,
Special Counsel.

Geo. Kemmerle Co., Printers, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 286

CITY OF CHICAGO,
Appellant,

vs.

DARIUS O. MILLS and PEOPLES GAS LIGHT AND COKE COMPANY,
Appellees.

Reply Brief in Behalf of Appellant.

The brief of counsel for appellee Mills consists of an opening statement followed by an argument of the case, which is divided into four subdivisions. We shall answer the various contentions of appellee's counsel in the order pursued in their brief.

Counsel's statement in their brief, page 22, that there was nothing in the order allowing the appeal or in the certificate for an appeal to indicate the question of jurisdiction that was certified to this court, is without merit. A detailed answer to that argument is set forth in this brief under Subdivision II.

The twelve assignments of error referred to by counsel for appellee (Rec., page 390) all deal with the error of the Circuit Court in denying the motion

of the City of Chicago to dismiss this suit upon the ground that the complainant Mills was improperly and collusively maintaining a suit in the Federal Court in a case where federal jurisdiction was wanting.

Counsel further contend that the question whether the board of directors of the Peoples Company rightfully refused to comply with Mr. Mills' request for a new suit, and the further question as to whether irreparable injury was being threatened to the stockholders by reason thereof—that the above questions have no relevancy on this appeal, for they involve questions of the general jurisdiction of the Circuit Court as a court of equity rather than the question of its jurisdiction as a federal court.

It is true that the sole question involved on this appeal is whether Mr. Mills collusively and at the instigation of the Peoples Company filed the bill of complaint in this cause for the purpose of conferring jurisdiction upon a federal court in a case where such jurisdiction was otherwise wanting. In determining the above question, however, the conduct of Mr. Mills and the corporate managers prior to the commencement of this suit is an important factor. Motive is one of the strongest circumstances from which the rightful or wrongful character of human conduct can be determined. If it be true that Mr. Mills' rights were being adequately protected by the corporate managers at the time his suit was started and that no irreparable injury to him as a stockholder was being suffered or threatened, then the inference is very strong that in commencing a new suit he acted, not for the purpose of preserving

his property rights, but at the instance and request of the corporation.

In determining the question of collusion, the proposition as to whether Mr. Mills, by his bill, made out such a case as entitled him to redress corporate wrongs in a court of equity, becomes an important one. The jurisdiction of the Peoples Company in the state court to contest the power of the City of Chicago to pass the ordinance in question was undisputed. The fact that Mr. Mills filed a suit as a stockholder under circumstances where a stockholder had no standing, and the fact that the corporation aided and assisted Mr. Mills in maintaining such a suit—these facts are cogent circumstances tending to show that the Peoples Company desired to avoid the forum of the state courts and were so anxious to go into the federal courts that they were willing to resort to the device of using a stockholder, even where a stockholder's rights were unfounded, or, to say the least, very questionable.

Counsel for appellee also cite a large number of authorities which they claim show that the City of Chicago had no power delegated to it by the legislature of the State of Illinois to regulate the price of gas, on October 15, 1900. This appeal is limited to jurisdictional grounds, and, therefore, we will not enter into a discussion of that question. It is sufficient for us to say that under the laws of the State of Illinois, as expounded by the highest court of the state, the power to regulate the price of gas was delegated to the City of Chicago.

Counsel also annex, as an appendix to their brief, the Act of the State Legislature, approved May 18, 1905, giving to the City of Chicago the power to

fix rates and charges for gas and electricity, and to sell surplus electricity, and an ordinance of the City of Chicago of February 8, 1906, regulating the price of gas thereafter. The evident purpose of bringing before this court matters that are clearly irrelevant and not placed in issue by this appeal is to prejudice the cause of the appellant. The passage of the act in question does not in the least tend to show that the City of Chicago did not have the right to regulate the price of gas prior thereto.

The act in question authorized the City of Chicago to sell surplus electricity and to regulate the price thereof, and as the authority of the city to regulate the price of gas had been questioned by the Peoples Company, out of abundant caution, the legislature inserted in the above act a provision authorizing the City of Chicago to regulate the price of gas so as to place that question beyond controversy.

Another evident purpose of annexing the ordinance of February 8, 1906, was to convey the impression to this court that the ordinance in question settled the suit here in controversy. The ordinance contains no such provision. On the contrary, Section 5 provides that the ordinance shall not affect "suits pending or rights existing at the time this ordinance takes effect or penalties then incurred." Of course, this ordinance is not before the court, for it is a private act, which was neither pleaded nor proved in the court below.

I.

AS TO QUESTIONS ARISING UNDER THE NINETY-FOURTH RULE IN EQUITY.

Counsel say in their brief, page 30: "Nor does any issue of fact arising under denials of due compliance with the ninety-fourth rule involve any question as to the jurisdiction of a circuit court as a court of the United States." This statement is untenable.

Equity rule 94 provides as follows:

> "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and *that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.* It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

In *Hawes* v. *Oakland,* 104 U. S., 450, this court affirmed the decree of the Circuit Court, dismissing the bill of complaint in that cause, because the bill was brought by a stockholder collusively and at the instigation of the corporation, for the purpose of conferring jurisdiction upon a federal court in a case where such jurisdiction was otherwise wanting, and in the case of *Corbus* v. *Alaska Treadwell*

Gold Mining Co., 187 U. S., 462, this court said that it was with a view of correcting the evils arising from the institution of collusive stockholders' suits as a means of evading the jurisdiction of the state courts which led to the promulgation of equity rule 94 by this court.

The case of *Illinois Central R. R. Co.* v. *Adams*, 180 U. S., 28, cited by counsel for appellee, does not sustain their contention. That case says that jurisdiction exists in the Circuit Court of the United States "if the plaintiff be a citizen of another state, if the amount in controversy exceeds $2,000, and the defendant be properly served with process within the district." But the word "plaintiff" as there used, means the *real plaintiff* and not a mere *pretended plaintiff who sues at the request and for the benefit of one of the defendants in the litigation.* No question of collusion was before the court in the *Adams* case. It was conceded that there was diversity of citizenship between the parties to that suit.

If the bill of complaint in any suit brought by a stockholder shows that the suit is a "collusive one" brought for the purpose of conferring "on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance," then it is the duty of the Circuit Court to dismiss such a case, and the failure to dismiss such a suit raises a question of federal jurisdiction under equity rule ninety-four. If upon a final hearing it develops that the suit is a collusive one, brought for the purpose of conferring jurisdiction on a federal court, then upon a motion of any party to the litigation, it becomes the duty of the court to dismiss the suit, and the failure of the court so to do will raise a question of federal jurisdiction.

II.

THE RECORD IN THIS CASE SHOWS THAT A SPECIFIC QUESTION OF FEDERAL JURISDICTION WAS IN ISSUE IN THE COURT BELOW AND WAS PROPERLY CERTIFIED TO THIS COURT.

On the 11th of February, 1905, the City of Chicago filed a general demurrer to complainant's amended bill of complaint (Rec., p. 91), and on August 1, 1905, the court overruled said demurrer. (Rec., p. 93.) On the 19th of August, 1905, the City of Chicago filed an answer (Rec., p. 101), which alleged that this suit was brought by the complainant, Darius O. Mills, *at the request of and for the benefit of the complainant, Peoples Gas Light and Coke Company, with the intent and for the purpose of conferring jurisdiction upon a Circuit Court of the United States in a case where such jurisdiction was wanting.*

On the 23rd day of February, 1906, Judge Grosscup handed down an opinion on said question of collusion and among other things said (Rec., p. 385):

> "On demurrer to the bill, and motion for injunction, the court held that the bill exhibited a case wherein a stockholder might sue, the company declining to sue; and that the ordinance complained of was invalid for want of power in the city council from the state to regulate rates. Accordingly an injunction was issued. *Thereupon the plea was interposed that the suit was collusive—that the stockholder had not brought his suit in good faith, to enforce his rights, and those of the other stockholders, but had brought it because of a collusive understanding between him and the Gas Company, based on the fact that by reason of his citizenship in the State of California a suit by him would lie in the United States Courts, while a*

suit by the company would have been cognizable only in the state courts."

After referring to the evidence introduced by the parties to this cause in support of their respective contentions on the question of collusion, Judge Grosscup decided that the suit was not collusive, but was brought by Mr. Mills in good faith. It will be noted that the *only question decided or discussed by Judge Grosscup in the above opinion was the question as to whether this suit was collusively brought for the purpose of conferring jurisdiction upon a Federal Circuit Court in a case where such jurisdiction was otherwise wanting.*

On February 27, 1906, a final decree was entered (Rec., p. 387) on the bill of complaint of the Peoples Company. On the 6th of March, 1906 (Rec., p. 389), the City of Chicago filed a petition for an appeal to this court, which recited that the Circuit Court committed error "by the final decree pronounced in this cause on the 27th day of February, 1906, and by the interlocutory orders and decrees heretofore pronounced in this cause, *in and by which said interlocutory orders and final decree this court assumed and asserted jurisdiction as a Circuit Court of the United States over this cause against this defendant;* and this defendant shows that said Circuit Court erred in taking jurisdiction of the bill and in not dismissing the bill in this cause for want of jurisdiction.

"And this defendant prays that an appeal should be allowed from this court to the Supreme Court of the United States *solely on the question of jurisdiction and that the question of the jurisdiction of the Circuit Court of the United States, for the North-*

ern District of Illinois, Eastern Division thereof, as a Federal Court in this cause, be certified to the Supreme Court of the United States by this court; and the said defendant, the City of Chicago, *presents herewith its assignments of error and prays the court to certify the said question of jurisdiction.*"

The assignment of errors above referred to, and which were filed with said petition, asserted (Rec., pp. 390-391) that said Circuit Court erred "in failing and refusing to dismiss the bill of complaint in this cause on the final hearing, because it appeared from the records in said cause that Darius O. Mills was improperly and collusively made and joined as a complainant in this cause, for the purpose of attempting to confer jurisdiction upon a Federal Court in a case where such jurisdiction would otherwise be wanting." At the same time (Rec., p. 392) an order for an appeal was entered by the Circuit Court in the following language:

> "Now comes the defendant, the City of Chicago, and enters its motion for an appeal from the decree entered in this cause on the 27th day of February, 1906, to the Supreme Court of the United States, in accordance with the petition for said appeal, this day filed, herein; and *upon a consideration of said petition* and *upon a consideration of the assignments of errors of the said defendant, the City of Chicago:*
>
> "It is hereby ordered that an appeal be and the same is hereby granted to the said City of Chicago in this cause to the Supreme Court of the United States, *solely upon the question of the jurisdiction of this court sitting as a Circuit Court of the United States, to hear and determine this cause,* between the parties to the bill as presented therein;
>
> "And it is further ordered that leave be and

the same is hereby granted the said City of Chicago to present to this court for certification on said appeal the record in this cause within thirty (30) days from this date, and that the bond on appeal be fixed at the sum of five hundred dollars."

During the same term at which said final decree was entered, Judge Grosscup duly filed his certificate (Rec., p. 394), in which he recited:

> "In this cause I hereby certify that *at the final hearing of this cause* and at the time of the entry of the decree herein on, to-wit: the 27th day of February, 1906, the defendant, *the City of Chicago, by its counsel, objected to the jurisdiction of this court as a Circuit Court of the United States to hear and determine this cause, and asked that this court dismiss this cause for want of jurisdiction as a Federal Court;* that on the 6th day of March, 1906, and after the entry of the final decree herein an appeal was prayed by the City of Chicago to the Supreme Court of the United States *solely upon the question of the jurisdiction of this court as a Circuit Court of the United States, to hear and determine this cause,* and that the said City of Chicago filed *its petition for said appeal and its assignment of errors on said appeal,* and that on the said 6th day of March, 1906, an appeal was granted by this court in this cause to the Supreme Court of the United States solely upon the question of jurisdiction."

The certificate of said Judge Grosscup further pointed out portions of the record to be certified to this court that were necessary to the determination of said question of jurisdiction, and among other things, enumerated (Rec., p. 396):

> "48. Opinion of Judge Grosscup, filed February 23, 1906."

The opinion of Judge Grosscup, filed February 23, 1906, is set forth on pages 385 to 387 of the Record and that opinion shows that at the final hearing of this cause the only question at issue between the parties was the question of whether or not the suit in controversy was collusively brought by the complainant Mills for the purpose of conferring jurisdiction upon a Federal Court in a case where such jurisdiction was wanting. Judge Grosscup held, in said opinion, that said collusion was not established by the case made by the City of Chicago. It thus appears from the certificate of Judge Grosscup and his opinion filed on the final hearing, which is made a part of said certificate, that on the final hearing of this case but *one question was before the Circuit Court,* namely, the question as to *whether or not this suit was collusively brought,* and it further appears that on February 23, 1906, Judge Grosscup, in his opinion, decided that question, and that question alone, and determined it adversely to the contention of the City of Chicago.

It will be noted that the order allowing the appeal stated that said appeal was granted "solely upon the question of the jurisdiction of this court as a Circuit Court of the United States, to hear and determine this cause," and only those portions of the record of the court below were ordered to be sent up that were necessary to the determination of that question of jurisdiction.

Counsel contend that the certificate on the question of jurisdiction should not only show that a motion was made by the City of Chicago to dismiss this cause for the reason that a Federal Court had no jurisdiction to hear and determine this cause, but

counsel further argue that the certificate should have recited the reasons assigned by the City of Chicago in support of this motion, namely, that the suit was collusively brought.

An examination of the authorities shows that that contention is without merit. Counsel for appellee have cited a large number of authorities which they claim sustain their contention, but have omitted to review or even refer to a leading decision of this court where a certificate exactly like the one here in controversy was held sufficient. We refer to the case of *Smith* v. *McKay*, 161 U. S., 355. A bill was filed in that case in the Circuit Court of the United States for the District of Massachusetts, by McKay against Smith and others, to enjoin the defendants from using certain patented devices and to obtain an accounting for royalties alleged to be due the complainant under certain agreements executed between said parties. The subsequent proceedings in that case were those stated by this court, page 356:

> "The defendants filed an answer responding to various allegations of the bill, and averring that the complainant, so far as he had any just cause of action, had a plain, adequate, and complete remedy at law. Subsequently the defendants filed a special motion to dismiss the bill for the alleged reason that the complainant had a plain, adequate, and complete remedy at law. After argument this motion was denied. The cause was heard upon the pleadings and proofs, and at the May term, 1889, an accounting was awarded, a Master was appointed, and, on the coming in of his report, on December 22, 1891, a final decree was rendered that the complainant should recover damages in excess of the sum of $5,000 and costs of suit. From this decree an appeal was taken and allowed to this court, and

error was assigned to the action of the Circuit Court in taking jurisdiction of the bill and in not dismissing the same for want of jurisdiction."

An order was entered in the case under consideration exactly like the one in the case at bar, namely, allowing the appeal "upon the question of jurisdiction," and the contention was there made that the jurisdictional question was not specifically stated, either in the order allowing the appeal or in the certificate. This court denied the efficacy of that contention, and said, page 356:

> "It is contended on the part of the appellee that we should dismiss this appeal, because the question of jurisdiction is not properly certified to this court.
>
> "The record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.* The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and a *part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied. It therefore appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in Shields* v. *Coleman,* 157 U. S., 168, and *Re Lehigh Min. & Mfg. Co.,* 156 U. S., 322."

It will be noted that the foregoing opinion of this court states that a part of the record certified to this court "is the opinion of the court below, in ac-

cordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied." That is exactly the condition of the record in the case at bar. The certificate signed and filed by the circuit judge during the term at which the final decree was entered recites (Rec., p. 394):

> "This court further certifies that the following portions of the record in this cause contain all the records of this court that have any reference to the jurisdiction of this court in this cause, and the clerk of this court is directed to certify and transmit to the Supreme Court of the United States the following portions of the record in this cause on this appeal."

And among the papers so enumerated is contained the following (Rec., p. 396):

> "48. Opinion of Judge Grosscup, filed February 23, 1906."

Referring to the opinion of Judge Grosscup, filed February 23, 1906 (Rec., p. 385), we find that that opinion shows that the City of Chicago interposed a plea "that the suit was collusive—that the stockholder had not brought his suit in good faith, to enforce his rights, and those of the other stockholders, but had brought it because of a collusive understanding between him and the Gas Company, based on the fact that by reason of his citizenship in the State of California, a suit by him would lie in the United States courts, while a suit by the company would have been cognizable only in the state courts."

And a further examination of said opinion discloses that the question of collusion was the only one passed upon and determined by Judge Gross-

cup on said final hearing. It will be noted that the certificate, which was held sufficient in the *Smith* case, *supra*, was far more indefinite than the one contained in the record in the case at bar. In the *Smith* case numerous questions of law and of fact were litigated and determined and among the many questions determined was the proposition urged by the defendants that the court had no jurisdiction because complainant had an adequate remedy at law. The order allowing the appeal stated that "*the question of jurisdiction* be certified to the Supreme Court and that *said appeal was allowed.*" It will be noted that the certificate did not even recite that the jurisdiction of the Circuit Court as a court of the United States was certified to this court. The order allowing the appeal in the case at bar is far more definite, for the order here certifies "the question of the jurisdiction of the Circuit Court, sitting as a Circuit Court of the United States." If an order which allows an appeal upon the question of jurisdiction alone without distinguishing between the general jurisdiction of the Circuit Court as a court of equity and its federal jurisdiction is sufficient, then it is folly to argue that an order like the one in the case at bar, which limits the appeal solely to the question of jurisdiction to the Circuit Court as a Federal Court, should be held insufficient. It is true that in the *Smith* case, *supra*, this court, after an examination of the entire record, reached the conclusion that no federal question was involved and therefore dismissed the appeal for that reason, but this court expressly decided that the question was properly certified, and dismissed the appeal upon its merits.

A painstaking examination of every case decided

by this court in reference to the sufficiency of a certificate on the question of jurisdiction fails to show any case which either intimates or suggests that a question certified in accordance with the practice recognized in the *Smith* case, *supra*, is insufficient.

The decision of this court in *Smith* v. *McKay*, *supra*, was based upon the decision of this court in *Shields* v. *Coleman*, 157 U. S., 168. An examination of the record in the case of *Shields* v. *Coleman* shows that the practice there pursued was identical with that disclosed by this record. The order of appeal in the *Shields* case was in the following language (page 175):

> "Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by James T. Shields, Jr., as receiver of the M. & C. G. R. R. Co. under appointment by the chancery court of Hamblen County, Tennessee, it is ordered that said appeal be granted, bond therefor in the penalty of five hundred dollars having been executed and approved by the court.
>
> "It is further ordered that the petition for supersedeas be denied.
>
> "*This appeal is granted solely upon the question of jurisdiction,* and unless counsel shall agree by stipulation, filed with the clerk, in respect to the portions of the record to be transcribed and filed in the said United States Supreme Court under said appeal as prayed and granted, the appellant has leave to present the record to the court on Saturday, the 29th of July, inst., for the determination of what portions of the record shall be certified to said Supreme Court under said appeal."

And the certificate in the *Shields* case indicated the portion of the record to be sent up to this court

in precisely the same manner that was pursued in the case at bar, for this court said, in approving of the practice there pursued:

> "In the order allowing the appeal it is explicitly stated that this appeal is granted solely upon the question of jurisdiction, and the court at the same time reserves to itself the right which is subsequently exercised of determining what portions of the proceedings should be so incorporated in the record sent here for the purpose of presenting this question."

In *The Bayonne,* 159 U. S., 687, this court again approved the practice in the *Shields* case, *supra,* and in reviewing the *Shields* case, said (page 694):

> "The Circuit Court allowed the appeal by an order stating: 'This appeal is granted solely upon the question of jurisdiction,' and reserving to the court the right, which it subsequently exercised, of determining what portion of the proceedings should be incorporated into the record for the purpose of presenting that question."

It will be noted that in the cases above cited this court has determined that but two steps are necessary for the purpose of properly certifying a jurisdictional question to this court:

First: That an order be entered granting an appeal solely upon the question of jurisdiction.

Second: That the court, by a certificate made during the term at which the appeal is allowed, designate the portion of the record to be sent up, and that that record, when so presented to this court, discloses a single definite question of the jurisdiction of the court below as a Federal Court, which was there determined.

The certificate in the case at bar has every requirement heretofore pointed out by this court as necessary to properly present a question of this character to this court.

REVIEW OF AUTHORITIES CITED BY APPELLEE'S COUNSEL IN SUPPORT OF THEIR CONTENTION THAT THE JURISDICTIONAL QUESTION WAS NOT PROPERLY CERTIFIED.

As we have already pointed out, the jurisdictional question in the case at bar was certified in strict conformity with the procedure which was expressly held sufficient in the case of *Smith* v. *McKay, supra,* and we believe that case is decisive of the question here presented.

Should this court, however, desire to enter into an examination of other authorities on this question, we have made a chronological review of all the cases cited by appellee's counsel. An examination of those cases will show that the doctrine laid down in *Smith* v. *McKay, supra,* has been uniformly adhered to in the subsequent decisions of this court on that question. The only cases where this court has held that a jurisdictional question was not properly certified are cases where there was *no certificate made by the trial judge during the term,* and where the appeal or writ of error was allowed *in general terms, without limiting that appeal or writ of error to the jurisdiction of the Circuit Court as a court of the United States.*

The first case relied upon by appellee's counsel is *Maynard* v. *Hecht,* 151 U. S., 324. In that case the writ of error was allowed in general terms, without being limited to the question of jurisdiction, and said writ specified "no particular ground of error"

(p. 328), and this court there expressly stated (p. 325) that "no certificate of question for decision was applied for or granted by the court."

In *Shields* v. *Coleman*, 157 U. S., 168, the only reference to a jurisdictional question in the order for an appeal was the following (p. 175): "This appeal is granted solely upon the question of jurisdiction." This, taken in connection with the petition for an appeal, was held to be a sufficient certificate.

In the case of *The Bayonne*, 159 U. S., 687, the certificate on the question of jurisdiction was filed after the term had expired. The order for an appeal was entered in general terms in the following language: "Appeal granted," without being restricted to the question of jurisdiction. This court then pointed out that the above order was insufficient, and not in conformity with the practice recognized in the *Shields* case, *supra*, and in distinguishing the two cases this court said, respecting the *Shields* case (p. 694):

> "The Circuit Court allowed the appeal by an order stating: '*This appeal is granted solely upon the question of jurisdiction.*'"

In *Van Wagenen* v. *Sewall*, 160 U. S., 369, the appeal was in general terms, and not limited in any way, and there was no certificate on the question of jurisdiction. This court again indicated that, had the court below limited the appeal "solely to the question of jurisdiction," the case would have been properly certified. For Justice Brown, in delivering the opinion of the court, said (p. 372):

> "So, also, in *Shields* v. *Coleman*, 157 U. S., 168, where the court below, granting the appeal,

> said, *'This appeal is granted solely upon the question of jurisdiction,' and made further provision for determining what part of the record should be certified to this court under the appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act.''*

In *Chappell* v. *U. S.*, 160 U. S., 499, this court said, at page 508, that there was no certificate of jurisdiction, and "the allowance of the writ of error is general, and not expressly limited to such question."

Merritt v. *Bowdoin College*, 167 U. S., 745, is a memorandum decision, and the record there discloses that there was no certificate of jurisdiction during the term, and no limitation of the appeal to the question of jurisdiction; but that after the term had expired, a certificate was filed which this court presumably held insufficient.

In *Huntington* v. *Laidley*, 176 U. S., 668, the jurisdictional question was held properly certified; and there is no intimation or suggestion in that case that a certificate like the one in the case at bar would be insufficient.

In *Arkansas* v. *Schlierholz*, 179 U. S., 598, this court said that the defenses which the court below held insufficient, and which it was sought to review by this court in an appeal on jurisdictional ground (p. 601), "went simply to the merits," and because no question of federal jurisdiction was involved, this court dismissed the appeal.

The case of *New York, etc., R. Co.* v. *Weisberg*, 191 U. S., 558, is a memorandum decision. There no certificate of jurisdiction was filed, and the writ of error was there allowed in general terms, without being limited to the question of jurisdiction.

In *Filhoil* v. *Torney*, 194 U. S., 356, there was no certificate of jurisdiction, the assignments of error were general, and not limited to the question of jurisdiction. The writ of error, this court said (p. 358), "was allowed generally and without any limitations or specification." Under the above circumstances it was held the question of jurisdiction was not properly certified in accordance with the practice recognized by this court in *Smith* v. *McKay*, 161 U. S., 355, and many other previous decisions of this court.

In *Courtney* v. *Pradt*, 196 U. S., 89, the appeal was general and not limited to jurisdictional grounds. On page 90 it was said, "No certificate of the question of jurisdiction was applied for or granted." It was there contended that inasmuch as the record disclosed a motion to remand to the state court, and its denial, therefore a question of federal jurisdiction was involved, and sufficiently presented, without a certificate or an order limiting the appeal. This court held (p. 92) that "no single and definite issue as to the jurisdiction of the Circuit Court as a Federal Court is presented," for, as the court said (p. 92), "it is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal Courts, as contradistinguished from the state courts. It did not in terms put in issue the power of the Circuit Court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground

for the purpose of bringing the case within the first clause of Section 5."

A profoundly different condition is presented by the record in the case at bar. Judge Grosscup certified (Rec., p. 394) that "at the final hearing of this cause and at the time of the entry of the decree herein on, to-wit: the 27th day of February, 1906, the defendant, the City of Chicago, by its counsel, objected to the jurisdiction of this court as a Circuit Court of the United States to hear and determine this cause and asked that this court dismiss this cause for want of jurisdiction as a Federal Court."

And in the certificate of Judge Grosscup (Rec., p. 396) he orders the opinion, filed on the final hearing, viz.: February 23, 1906, to be sent up to this court. And in accordance with the decision of this court in *Smith* v. *McKay*, 161 U. S., 355-56, when "a part of the record so certified is the opinion of the court below" that opinion may be looked to for the purpose of determining whether a definite federal question was presented and determined. Referring to the opinion of Judge Grosscup, so filed on the final hearing (Rec., pp. 385-387), we find that but a single question was there considered and determined, namely, whether Mr. Mills' suit was brought collusively at the request of and for the benefit of The Peoples Company, for the purpose of conferring jurisdiction upon the Federal Courts in a case where such jurisdiction was otherwise wanting. And it appears that Judge Grosscup decided this question adversely to the contention of appellant, and assumed jurisdiction.

Counsel for appellee Mills also find fault because

the court certified for the consideration of this court on the question of jurisdiction, almost the entire record; and they claim that it is imposing an unnecessary burden upon this court to compel this court to examine such a voluminous record. The complete answer to the contention is that the evidence of the collusive and dishonest combination between Mr. Mills and the officers and directors of The Peoples Company is found scattered through this entire record, from the beginning to the end of this protracted litigation. Ordinarily a question of jurisdiction may be determined by an inspection of a small portion of the record. But in a case where collusive conduct is involved, and the evidence of that collusion is adroitly concealed, it is often necessary to scan the entire conduct of the parties from the beginning to the end of the lawsuit.

The collusive combination between Mr. Mills and the officers and directors of the Peoples Company began in December, 1902, shortly after the final decree had been rendered by Judge Grosscup in the *Peoples Company* case, holding that the Peoples Company had no right to contest in a Federal Court the power of the City of Chicago to pass the gas regulating ordinance in question, and the various affidavits, orders, and proceedings in both cases, from that time until the final hearing, elucidate and unfold the existence of that collusive combination between the above parties.

The motion of the City of Chicago prior to the final hearing herein, for a rule on the complainant Mills to file a fifteen million dollar injunction bond becomes an important piece of evidence on the question of collusion when it is coupled with the fact

that Mr. Meagher, although pretending to be fighting Mr. Mills at that time, goes to Mayor Dunne and complains that counsel for the City of Chicago are treating Mr. Mills unfairly in asking for such a bond.

The first answer of the Peoples Company, filed November 24, 1905, which prays that the Mills suit should be dismissed, is a persuasive piece of evidence tending to show collusion when coupled with the fact that at the same time that answer was filed Mr. Meagher, counsel for the Peoples Company, was gathering witnesses for the complainant Mills, and assisting him in making out a case against the City of Chicago and the officers of the Peoples Company. Each and all of the orders and proceedings certified to this court thus become important links in the chain of evidence tending to establish the collusive character of the conduct of Mr. Mills and the officers and directors of the Peoples Company.

We merely wish to suggest that the tendency of the decisions of this court, especially the later ones, has been to exhibit great liberality in sustaining appeals on jurisdictional grounds, where a real and substantial question of federal jurisdiction was raised in the court below, and where the order granting the appeal limited that appeal to jurisdictional questions.

III.

THE COMMENCEMENT OF A STOCKHOLDERS' SUIT, AT A TIME WHEN NO IRREPARABLE INJURY WAS BEING SUFFERED OR THREATENED, BY MR. MILLS WAS STRONG EVIDENCE OF COLLUSION.

Counsel for appellee attempt to show that the "situation as it existed in January, 1903," demanded

the immediate commencement of another suit for the purpose of declaring invalid the ordinance of October 15, 1900. If the situation was as urgent and imperative as claimed by counsel, why did Mr. Mills delay the filing of such a suit until June 8, 1903? Counsel point out the enormous loss that would have been sustained by the company if it had complied with the ordinance in question and furnished gas at seventy-five cents per one thousand cubic feet. The conclusive answer to that contention is that the board of directors had never exhibited the slightest disposition to comply with the ordinance in question. They had never refused to begin a new suit for the purpose of contesting the validity of the ordinance in question.

The minutes of the board of directors of January 29, 1903, show that the company merely decided "to defer action until the Supreme Court of the United States shall have finally decided upon the merits of the case brought by this company now pending upon appeal to that court." In other words, the officers of the Peoples Company had expressed themselves willing to begin a new suit to test the validity of the ordinance of October 15, 1900, as soon as the Peoples Company's bill, pending in this court, had been decided. Before that appeal was decided there was no necessity for a new suit, for, if the contract rights of the complainant were well taken, then there was no necessity for such a suit.

If, as this court decided, those contract rights were unfounded, then the commencement of a new suit immediately after the decision of the Peoples Company's appeal would be adequate to protect all

corporate rights. The commencement of the suit of Mr. Mills on June 8, 1903, while the Peoples Company's case was pending and undisposed of in this court, demonstrates two things:

First: That neither Mr. Guthrie nor Mr. Meagher had any confidence in the alleged contract rights that were urged in this court, but believed that such rights were unfounded, and that the company would eventually have to litigate the question of the power of the city to pass the ordinance in question.

Second: Counsel foresaw that the only pretense under which a stockholder could act would be to commence such a suit before the case of the Peoples Company had been determined by this court.

Counsel evidently foresaw that it would be preposterous to have the officers of the Peoples Company pretend that that company did not want to further contest the power of the City of Chicago to pass the ordinance in question. Such a claim would be contrary to all human experience and such procedure would be entirely too transparent. It was believed that the scheme here resorted to would carry a greater air of plausibility. It was thought that the appearance of a dispute between Mr. Mills as a stockholder and the corporate managers could best be carried on by having Mr. Mills pretend that he wanted a suit instituted in December, 1902, and that the corporate managers, while agreeing with Mr. Mills as to their desire to have the ordinance of October 15, 1900, declared invalid, yet such officers believed it wise to defer action until this court had passed upon the appeal of the Peoples Company

IV.

AS TO THE EVIDENCE ON THE QUESTION OF COLLUSION.

Counsel's contention under this head that "the bill in this suit as originally filed contained two separate and distinct grounds of jurisdiction, the one impairment of the contract right, and the other diversity of citizenship," is not tenable.

Judge Grosscup had already decided long prior to the filing of Mr. Mills' suit (Rec., p. 294), that the charter of the Peoples Company did not give that company any contract rights with reference to the price at which gas could be sold, and such was the opinion of this court in the same case. (*Peoples Gas Light and Coke Company* v. *Chicago,* 194 U. S., 1.)

It will thus appear that the alleged diversity of citizenship was the only ground of federal jurisdiction alleged in Mr. Mills' bill of complaint, as originally filed. A case of federal jurisdiction, by reason of the impairment of contractual obligations, is not made out by alleging reliance upon an instrument which does not constitute a contract. Counsel also claim that the company could have filed a bill in the United States court, praying "divisional relief" under its alleged contract right. This court never decided that the Peoples Company was entitled to divisional relief, but, assuming such to be the fact, the proposition still remains that neither Mr. Mills nor the company ever desired any divisional relief. Divisional relief would only relieve the company from complying with the ordinance in question in a small portion of the City of Chicago.

The company wanted complete relief with reference to the entire city.

It thus appears that the Peoples Company could not itself obtain any relief in a Federal Court with reference to the ordinance in question, and further, that the only way the company could get into a Federal Court was by securing a nonresident stockholder to institute a suit in behalf of the corporation and basing federal jurisdiction exclusively upon alleged diversity of citizenship.

The case of *Simpson* v. *Union Stock Yards Co.*, 110 Fed., 799, cited by counsel, instead of being an authority in their favor, tends directly to sustain our contention. That case says: "There could have been no collusion, because there can be no collusion without reason or motive, or to subserve some purpose." The court then points out that although the corporation was a citizen of the State of Nebraska, yet the right to pass the act there before the court was a federal question, which gave a Federal Court jurisdiction, regardless of the citizenship of parties. Here no federal question was involved, except the one of diversity of citizenship, which was created by the collusive arrangement between Mr. Mills and the officers of the Peoples Company.

Counsel dwell at length upon the fact that the minutes of a meeting of the board of directors of the Peoples Company, made on January 29, 1903, showed that the people of the City of Chicago were prejudiced against the Peoples Company, and that the commencement of a new suit "might tend to inflame an already hostile opinion."

The most superficial examination of the evidence in this case shows that the alleged reasons thus

spread upon the records of the corporation books were a sham and a pretense, manufactured by the board of directors for the purpose of laying a foundation for the commencement of this collusive suit. Mr. Brady, the vice-president and a director of the Peoples Company, the man who proposed the resolution against the commencement of any further litigation, and the one man who was chiefly instrumental in getting up the minutes above recited, paid Mr. Mills, on May 14, 1903, $5,000 for the expenses of Mr. Mills' suit. (Rec., p. 189.)

Counsel argue that the employment of Mr. Guthrie to represent the company in this court at the very time that he was supposed to be fighting the board of directors in the stockholder's suit was no evidence of collusion and quote the following excerpt from the opinion of Judge Grosscup, page 62:

> "Nor is it to be held that because two clients employ the same counsel respecting the same general end, they are in agreement or collusion as to the means of bringing about the end."

The above opinion of Judge Grosscup, as applied to the facts of this case, is not persuasive. We are told (page 48) by counsel for appellee that the officers and directors of the Peoples Company had been so negligent in looking after the rights of the stockholders that "by one day's violation of this ordinance the company might incur the practical forfeiture and confiscation of all its property," and we are told that Mr. Mills, who had a fortune of $2,200,000 invested in the stock of this company, took the matter into his own hands and, in good faith and without collusion, filed a bill to enjoin the directors and stockholders of the company from thus permit-

ting a destruction of the corporate property and from thus destroying Mr. Mills' entire investment, and we are told that the very officers and directors who had been charged with such palpable omission of duty and whom Mills sought to enjoin in this suit, go and retain Mr. Guthrie, the very counsel who had made the above serious charges against them, and we are told that Mr. Guthrie sees no impropriety in accepting a retainer from the very officers who had thus, by their negligence, almost ruined his client's fortune.

Much is said in the argument of appellee's counsel in reference to the amendment of the record by agreement of parties on December 5, 1903. We have already pointed out in our original brief that that amendment was made by agreement between Mr. Guthrie and Mr. Meagher and for the purpose of enabling them the more successfully to carry on the collusive stockholder's suit without running counter to pleas of former adjudication in the Peoples Company's suit.

The case of *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79, is cited, which holds that the fact that the corporation agreed with the stockholders as to the unconstitutionality of the statute there under consideration was not evidence that the suit was collusive. In that case this court said that such a state of affairs only emphasized the "fact that the officers were refusing to protect the interests of stockholders." In the *Cotting* case the officers did nothing. In the case at bar the corporate officers had exercised every diligence known to the law in defeating the ordinance in question. In the *Cotting* case the officers of the corporation did nothing to

assist the stockholders in carrying on the litigation. In the case at bar Mr. Brady, the vice-president and director of the company, paid the entire expense of the stockholder's suit, Mr. Meagher, counsel for the Peoples Company, prepared the evidence and procured the witnesses and brought them into court, so that the stockholder could prove his case.

While Mr. Brady and Mr. Meagher were secretly paying the expenses and gathering the evidence, they were openly and ostensibly pretending to be hostile to the stockholder's suit. No such condition of affairs is presented in any of the cases cited by appellee's counsel, and therefore they are not in point. No case has been cited by counsel and we believe none can be found where, under the circumstances disclosed by this record, any court has held that a suit was free from collusion.

Counsel quote from the testimony of Mr. Brady (page 72), wherein Mr. Brady testified that Mr. Mills, a few days prior to May 14, 1903, approached Mr. Brady and asked Mr. Brady for a contribution of $5,000 towards paying the expenses of Mr. Mills' suit. Mr. Mills testifies (Rec., p. 186) that he don't think that he had any conversation with Mr. Brady on the subject, and he further testified (Rec., p. 182) that he got this check in an envelope with no explanation as to what it was for, and further, that he somehow got the impression that it was the expenses of his suit against the City of Chicago.

Mr. Mills' explanation is undoubtedly the correct one, for it is probably true that the officers of the Peoples Company had arranged for the payment of this $5,000 through Mr. Brady, and that Mr. Brady mailed the check to Mr. Mills without previous con-

versation about the matter, except what Mr. Mills had been told when the suit was started, namely, that the company would bear the expense.

Mr. Brady's story is wholly improbable, for, according to his theory, he had had no conversation with Mr. Mills after January 29, 1903. At a directors' meeting, January 29, 1903, Mr. Brady proposed the resolution which was there adopted, refusing to comply with Mr. Mills' request for the commencement of another suit.

Is it within the realm of any reasonable human probability that Mr. Mills would go to the one man whom he knew was opposed to any further litigation and ask that man for $5,000, being the expense of the entire suit? And isn't it almost miraculous that Mr. Brady, the man who was opposed to any further litigation with the City of Chicago, should, on the spur of the moment and without consulting with his own counsel or counsel for the company, enter into an arrangement with Mr. Mills to carry on the very litigation which he had so forcibly declared against only a short time before? Concerning testimony of this character Lord Stowell well observed, "The court must have the faith of ten men to believe it."

But counsel say it is inconceivable that Mr. Brady should have sent his personal check to Mr. Mills and thus made a record which would establish the collusive character of this suit. That argument is based upon the supposition that men who enter into unlawful and collusive arrangements invariably destroy and eliminate all evidences of their dishonest and unlawful conduct. Human experience teaches the contrary. A similar argument would prove that the railroad companies never gave rebates in viola-

tion of the Interstate Commerce Acts, else why would they have entered upon their books the evidences of their criminal conduct?

The truth of the matter is that neither Mr. Mills nor Mr. Brady expected that this matter would ever come to light. Counsel for Mr. Mills, in his direct examination, carefully and studiously avoided all reference to this $5,000 check. Mr. Brady, the man who contributed it, was kept off the stand until his presence to explain away this damaging evidence was rendered necessary by Mr. Mills' disclosure. The existence of this $5,000 check was brought to light only after a lengthy cross examination of Mr. Mills.

Counsel for appellee say that "counsel for the City of Chicago, realizing the ease with which an old gentleman could be confused," tried to entrap the witness.

The difficulty with that argument is that Mr. Mills was answering the questions propounded to him by his own counsel (Rec., p. 164) when he made the fatal admission that this suit was brought in the Federal Court for the purpose of conferring jurisdiction upon that court in a case where such jurisdiction would otherwise be wanting. His own counsel made the most drastic effort, at the time the witness answered the question, to induce him to change the answer, but the witness refused. The next day the witness was recalled by Mr. Mills' counsel (Rec., p. 195) and an attempt was there made to induce the witness to change his testimony of the previous day. An examination of the record, however, discloses that that attempt was equally unavailing. True, the witness said, in response to the

leading and suggestive question of his own counsel, "I don't think I properly understood the question," but he did not there negative the unambiguous and decisive answer on the preceding day, namely, that this suit was collusively brought.

The theory that Mr. Mills did not understand the questions propounded to him, when testifying concerning the collusive character of this suit was first suggested by Mr. Guthrie. That is made clear by the cross examination of Mr. Mills (Rec., p. 196), where he testified as follows:

> "Q. Since the hearing yesterday have you had any talk with anybody about this matter? A. I had a few minutes' talk with Mr. Guthrie.
>
> "Q. And you talked over some of your evidence yesterday, didn't you? A. Yes. This evidence that I have just been testifying to. Simply to draw my attention to it, the correctness of it."

Mr. Guthrie undoubtedly informed the witness that his admissions, made on the preceding day, were fatal to his suit and that it would have to be explained in some way, and it was undoubtedly suggested to him that the only way out of it was for the witness to say that he didn't understand the question.

We confidently submit that the evidence given by Mr. Mills to the effect that this suit was collusively brought is corroborated by the conduct of all the parties to this litigation from the beginning to the end and is in no wise inconsistent with any of the facts and circumstances disclosed by this record. In a case where the circumstances pointing to collusion are so numerous and cogent as in the case at bar, it

is extraordinary to ask a court to disregard the admissions of the party to the suit, deliberately and advisedly made when answering questions propounded by the party's own counsel.

We respectfully submit that the decree of the Circuit Court should be reversed.

JAMES HAMILTON LEWIS,
Corporation Counsel.

HENRY M. ASHTON and
DAVID K. TONE,
Special Counsel.